IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 779 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT and

MR.JUSTICE J.R.VORA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

SINDHI LUHANA GHANSHYAM KIMATRAI

Appearance:

MR ST MEHTA, APP for Appellant

MR YOGESH S LAKHANI for Respondent

CORAM : MR.JUSTICE H.R.SHELAT and

MR.JUSTICE J.R.VORA

Date of decision: 25/01/2000

ORAL JUDGEMENT : [Per: Vora, J.]

1. Respondent - original accused came to be tried by learned Addl. Sessions Judge, Junagadh, for the charges under Sec. 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and Sec.66 (A) of the Bombay Prohibition Act. Accused - present respondent was acquitted by learned Addl. Sessions Judge, Junagadh by his judgment and order dated 15th June, 1992.

2. Necessary facts leading to the prosecution and this Appeal are summarised as under :

The incident in question had occurred on 28th September, 1991 at Junagadh, where the Manorajan Circuit House Police Station is situated. On the day of the incident, task force Police Inspector Mr. D.K. Ravaliya, Sub-Inspector Mr.Vandarwala and other staff were present. Inspector Mr.D.K. Ravaliya received the information that a person named Sindhi Luhana Ghanshyam Kimatrai (respondent - accused) keeps opium poppy capsules in his possession and in godown, which stands in the name of his mother. The panchnama from 11.00 a.m. to 11.15 a.m. being preliminary panchnama was prepared in the presence of panchas and Police Inspector Mr. D.K. Ravaliya along with Sub-Inspector Mr. Vandarwala and other police staff of the said task force then went to the residential house of the respondent, where respondent was present and his residential premises was searched nothing was found. But on an information supplied by respondent accused, police staff as aforesaid went to the godown owned by the mother of the respondent along with accused respondent and accused respondent opened the godown by opening the lock with the key which was in his possession. Panchas were also accompanied. On search of the godown, in all 42 bags of opium poppy was found in powder condition. Out of the each bag, 100 gram contents were taken out for the analysis, which was seized and sealed in the presence of panchas and 42 bags were also seized and sent to the police station. A detailed panchnama was prepared, written complaint was filed by Police Inspector Mr.D.K. Ravaliya against the respondent accused at 2045 hours before the police station, which was registered as FIR. The investigation was then handed over to Mr. Vandarwala, Police Sub-Inspector, who investigated the offence and filed charge sheet against the present respondent in the court of learned Judicial Magistrate, First Class at Junagadh, who committed the case to the court of Sessions empowered to try the case.

3. After framing the charge under Section 15 of the Narcotic Drugs & Psychotropic Substances Act and Section 66(1) of the Bombay Prohibition Act, the prosecution led

the evidence and after hearing both the sides, the learned Addl. Session Judge, as aforesaid, acquitted the accused. Being aggrieved by, the prosecution - State has filed the present Appeal.

4. Learned APP Mr. S.T. Mehta for the appellant State and learned Advocate Mr. Lakhani for the respondent accused were heard at length.

5. This Appeal is required to be decided on the legal issues, which have arisen during the hearing and, therefore, we do not consider it necessary to go into the detailed facts of the case and the reasoning given by the learned Addl. Sessions Judge for acquitting the respondent.

6. The first legal contention which was raised was regarding non-compliance of Section 42(1) and 42(2) of the Narcotic Drugs & Psychotropic Substances Act. Section 42(1) of the Act is as under :

42(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue, intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset --

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such

entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance;

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. after recording the grounds of his belief.

7. Therefore, it is obligatory on such Officer, that if he receives any information envisaged by Sec. 42(1), he shall reduce the same in writing.

8. While Section 42(2) provides that such officer taking down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior.

9. From the above said provision, it is evident that if any such officer receiving any information regarding commission of any offence under the Act, he shall take down that information in writing and secondly he shall then forthwith forward the same to his superior.

10. Now, applying the above mentioned provisions to the present case, we may now revert to the necessary facts. It is an admitted case of the prosecution that on 28th September, 1992, Police Inspector of the said task

force Mr. D.K.Ravaliya received a specific information that the respondent keeps in his possession and in the godown which is owned by his mother the opium poppy without pass or permit. This fact is categorically mentioned in the complaint given by Mr. D.K. Ravaliya, Police Inspector, which is produced at Exh.40. Further, Police Inspector Mr. D.K.Ravaliya in his deposition at Exh. 15, Police Head Constable, who accompanied in the raid Mr. Virabhai Shivabhai at Exh. 28 and Investigating Officer Mr. Chunnilal Ramjibhai at Exh.68 depose the same fact that they received the information regarding the commission of offence under the Narcotic Drugs & Psychotropic Substances Act and to the extent that the information regarding the name of the person, who commits the offence was also received by them. Therefore, this is an admitted case of the prosecution that they carried out the search and in pursuance of which, opium poppy was recovered, was the result of the information received.

11. From the above admitted case of the prosecution now the questions arise whether under Section 42(1) Police Inspector Mr. D.K. Ravaliya was obliged to take down in writing the information which he received regarding the commission of offence and whether he was obliged to forward such information to his superior as per Section 42(2) as aforesaid. If the provisions of Section 42 are not complied with, then what would be the effect of the same on the prosecution and the trial.

12. The Apex Court in the matter of STATE OF PUNJAB vs.BALBIR SINGH, reported in (1994) 3 SCC 299, in paras 15 and 25 has observed that the object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. The Apex Court further observed that it is obligatory that such of those officers mentioned under Section 42 that on receiving an information, should reduce the same to writing and also record reasons for the belief which carrying out arrest or search as provided under the proviso to Section 42(1). The Apex Court further observed that to that extent the provisions are mandatory and the failure to comply with these requirements thus affects the prosecution case and ultimately vitiates the trial. The Apex Court also observed that the total non-compliancce of Section 42 (2) also being a mandatory provision would vitiate the trial.

13. From the above observations of the Apex Court, it is crystal clear that the concerned Police Officer Mr.D.K. Ravaliya i.e. complainant though was permitted to investigate and authorised to search and arrest in respect of the offences under the Narcotic Drugs & Psychotropic Substances Act and admittedly though he received information regarding the commission of offence thereto by the present respondent, he did not take down the same in writing. In his deposition, at Exh. 15 in para 15 he stated that he has not written down the information which he received. Therefore, it is clear case where the mandatory provisions of Section 42(1) has been violated. When there is no attempt to take the information in writing, the question of sending the same to his superior would not arise, which would again cause a breach to the mandatory provision of Section 42(2). It is ruled by the Apex Court in State of Punjab vs. Balbir Singh (supra) that such a breach of mandatory provision would affect the prosecution case to the extent that the same will vitiate the trial. Therefore, in the present case, since there is non-compliance of Sections 42(1) and 42(2), the accused is entitled to acquittal on this ground alone because non-compliance vitiates the trial and the accused is entitled to acquittal.

14. We, make it clear that this Appeal is decided on the reasons stated above and the acquittal of the accused is maintained for the breach of Sections 42 as aforesaid. We, therefore, do not consider it necessary to refer to the reasons mentioned by the learned trial judge for recording the order of acquittal.

15. In view of the aforesaid, the appeal fails and the same stands dismissed.

---

p.n.nair